Projek Lebuhraya Usahasama Bhd & Anor v Zakaria bin Hamid (biological father to the deceased, Azizi bin Zakaria) & Anor

HIGH COURT (TAIPING) — CIVIL APPEAL NO AB-12BNCVC-10–06 OF 2022
NOOR RUWENA JC
20 DECEMBER 2023

Civil Procedure — Appeal — Appeal from subordinate court to High Court — Whether trial judge was not 'plainly wrong' in her decision but had come to a reasoned judgment based on the facts, evidence and applicable laws — Whether appellate intervention was not warranted in respect of trial court's findings on liability and quantum

The first appellant ('PLUS') was the concession holder of, inter alia, the North-South Highway in Peninsular Malaysia whilst the second appellant ('PROPEL') maintained and managed the highway. At 11.45pm on 27 April 2018, one Azizi bin Zakaria ('the deceased') was in a convoy of seven motorcyclists riding along the highway when, at KM177.8, the deceased's motorcycle struck a yellow-orange metal object lying on the emergency lane. The collision flung the deceased off his machine and on to the fast lane of the highway. The deceased died as a result of the crash. The respondents, who were the deceased's parents, filed a dependency claim against the appellants in the sessions court contending that the deceased gave them RM700 per month from his earnings. The respondents submitted before the trial court that the appellants' negligence in failing to ensure that the road surface was free of hazards had caused the accident and the deceased's death. They said the place where the accident happened had no lighting or any form of warning signs. The appellants denied liability, saying that their personnel had patrolled the accident area about 20 minutes before the accident happened and had found no hazards at the stretch. The appellants surmised that the metal object that struck the deceased's motorcycle must have fallen off some vehicle, such as a lorry or container, and that it was impossible for PLUS to prevent such an eventuality from happening. The trial court held the appellants 80% liable for the accident and allowed the dependency claim. The appellants appealed against the whole of the decision whilst the respondents appealed against the multiplicand for the dependency claim that was reflected in the court documents, contending that it should be RM500 per month as was pronounced by the trial judge in open court and not RM300 per month as was stated in the trial court's grounds of judgment and the approved draft judgment.

Held, dismissing the appellants' appeal, allowing the respondents' appeal and varying the dependency contribution amount to RM500 per month:

(1) There were no grounds to justify appellate intervention with regard to the trial court's finding of liability. This court agreed with the factual findings made by the trial judge based on the evidence. The judge had given a reasoned judgment and applied the relevant laws in arriving at her decision. The quantum awarded to the respondents was also fair, reasonable and adequate in the circumstances of the case (see paras 21 & 41–42).

(2) On its website, PLUS claimed that it was committed to ensuring the safety of its road-users. But instead of just paying lip-service to such commitments, PLUS and PROPEL should be proactive in undertaking reforms to highway maintenance measures to ensure that road-users were actually protected. They should strive to do things better and not always repeat the argument that it was unreasonable to expect PLUS and PROPEL to always keep a lookout for fallen debris and foreign objects on its highways (see para 32).

[Bahasa Malaysia summary

Perayu pertama ('PLUS') adalah pemegang konsesi, antara lain, Lebuhraya Utara-Selatan di Semenanjung Malaysia manakala perayu kedua ('PROPEL') menyelenggara dan menguruskan lebuh raya tersebut. Pada 27 April 2018 jam 11.45 malam, Azizi bin Zakaria ('si mati') telah menyertai konvoi tujuh penunggang motosikal di lebuh raya tersebut. Di KM177.8, motosikal si mati telah melanggar objek besi berwarna kuning-oren di atas lorong kecemasan. Perlanggaran itu menyebabkan si mati tercampak daripada motorsikalnya dan terus tercampak ke lorong laju lebuh raya. Si mati meninggal dunia akibat kemalangan itu. Responden-responden yang merupakan ibu bapa si mati, memfailkan tuntutan terhadap perayu-perayu di mahkamah sesyen dengan alasan bahawa si mati memberikan mereka RM700 sebulan daripada pendapatannya. Responden-responden berhujah di mahkamah perbicaraan bahawa kecuaian perayu yang gagal memastikan jalan raya bebas dari bahaya telah menyebabkan kemalangan dan kematian si mati. Mereka berhujah bahawa tempat di mana kemalangan itu berlaku tidak mempunyai lampu atau sebarang bentuk tanda amaran. Perayu-perayu menafikan liabiliti, mengatakan bahawa anggota mereka telah melakukan rondaan di kawasan kemalangan sekitar 20 minit sebelum kemalangan itu berlaku dan mendapati tiada bahaya di laluan tersebut. Perayu-perayu mengatakan bahawa objek besi yang melanggar motosikal si mati itu semestinya terjatuh dari beberapa kenderaan seperti lori atau kontena dan adalah mustahil bagi PLUS untuk mengelakkan perkara itu dari berlaku. Mahkamah perbicaraan memutuskan perayu-perayu bertanggungjawab sebanyak 80% atas kemalangan itu dan membenarkan tuntutan tersebut. Perayu-perayu merayu terhadap keseluruhan keputusan itu manakala responden-responden merayu terhadap tuntutan di dalam dokumen

A mahkamah dengan alasan bahawa jumlah yang sepatutnya RM500 sebulan seperti yang dinyatakan oleh hakim perbicaraan di mahkamah terbuka dan bukannya RM300 sebulan seperti yang dinyatakan dalam alasan penghakiman mahkamah perbicaraan dan draf penghakiman.

B **Diputuskan**, menolak rayuan perayu-perayu, membenarkan rayuan responden-responden dan mengubah jumlah sumbangan sebanyak RM500 sebulan:

(1) Tiada alasan untuk mewajarkan campur tangan rayuan berhubung dapatan mahkamah perbicaraan mengenai liabiliti. Mahkamah ini C bersetuju dengan penemuan fakta yang dibuat oleh hakim perbicaraan berdasarkan keterangan yang dikemukakan. Hakim bicara telah memberikan alasan penghakiman dan mengaplikasikan undang-undang yang berkaitan ketika mencapai keputusannya. Kuantum jumlah yang diberikan kepada responden juga adil, munasabah dan mencukupi D menurut keadaan kes (lihat perenggan 21 & 41–42).

(2) Menurut laman webnya, PLUS menyatakan bahawa mereka komited untuk memastikan keselamatan pengguna jalan rayanya. Namun dari sekadar memberi janji kosong kepada komitmen tersebut, PLUS dan E PROPEL perlu proaktif dalam melaksanakan pembaharuan kepada langkah-langkah penyelenggaraan lebuh raya bagi memastikan pengguna jalan raya benar-benar dilindungi. Mereka seharusnya berusaha untuk melakukan perkara yang lebih baik dan tidak perlu menggunakan hujah bahawa adalah tidak munasabah untuk PLUS dan F PROPEL perlu sentiasa mencari serpihan objek yang jatuh dan objek asing di lebuh rayanya (lihat perenggan 32).]

Cases referred to

Ahmad Rashidi bin Yahya & Anor v Projek Lebuhraya Usahasama Bhd [2021] G MLJU 1632, HC (refd)
Ali v Bradford Metropolitan District Council [2012] 1 WLR 161, CA (refd)
Baker v Quantum Clothing Group [2011] 1 WLR 1003, SC (refd)
Burnside and another v Emerson and another [1968] 1 WLR 1490, CA (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)
H *Donnelly v Joyce* [1973] 3 All ER 475, CA (refd)
Edwards v National Coal Board [1949] 1 KB 704, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Gorringe v Calderdale Metropolitan Borough Council [2004] 1 WLR 1057, HL I (refd)
Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1; [2016] 2 CLJ 885, FC (refd)
Khairun Nizad bin Daud & Anor v Juprin Paul [2018] 9 MLJ 32, HC (refd)

LBS Travel Sdn Bhd dan satu lagi lwn Nathan a/l Muthayah dan lain-lain [2019] 8 MLJ 767, HC (folld)
Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal [2006] 1 MLJ 675,CA (refd)
Muhammad Farhan bin Daud lwn Projek Lebuhraya Usahasama Bhd (Plus) [2023] MLJU 380, MC (refd)
Muhamad Nizam Rejab v Projek Lebuhraya Usahasama Berhad [2017] MLRSU 35, Sc (refd)
Ng Chul Sia v Maimon bt Ali [1983] 1 MLJ 110 (refd)
Noorianti bte Zainol Abidin & Ors v Tang Lei Nge [1990] 2 MLJ 242, HC (refd)
Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara-Selatan [1997] 5 MLJ 488; [1997] 4 CLJ 54, HC (refd)
Projek Lebuhraya Usahasama Bhd v Abdul Azim John bin Abdullah [2022] MLJU 1181, HC (refd)
Projek Lebuhraya Usahasama Bhd v Hawa Liyana binti Hashim (suing as the lawful wife and dependant of Imran Kamali bin Ahmad Nadzirin, deceased) [2018] MLJU 2011, HC (refd)
Projek Lebuhraya Utara-Selatan Bhd v Hmd Rais Hussin A Mohamed Ariff [2011] 10 CLJ 679, HC (refd)
Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 5 MLJ 360, CA (refd)
Rasidin bin Partorjo v Frederick Kiai [1976] 2 MLJ 214, FC (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22; [1985] 1 CLJ 429, SC (refd)
Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177; [2018] 2 CLJ 641, FC (refd)
Wong Li Fatt William (an infant) v Haidawati bte Bolhen & Anor [1994] 2 MLJ 497, HC (refd)
Yang Salbiah & Anor v Jamil bin Harun [1981] 1 MLJ 292, FC (refd)

Legislation referred to

Federal Roads (Private Management) Act 1984 s 5
Highway Acts 1980 [UK] s 150
Highway Authority of Malaysia (Incorporation) Act 1980 s 11

Athithan Singaravelu (Athi & Seelan) for the appellant.
Ayleswary (Arnold Andrew & Co) for the respondent.

Noor Ruwena JC:

INTRODUCTION

[1] The parties will be referred to as they were at the sessions court as both plaintiffs and defendants have appealed and cross-appealed against the whole decision of the sessions court judge ('SCJ') delivered on 24 May 2022. The SCJ then had found the first and second defendants, Projek Pebuhraya Usahasama

Bhd (PLUS) dan Projek Penyelenggaraan Lebuhraya Berhad (PROPEL) liable for the accident on the night of 27 April 2018 that tragically cost the life of Azizi bin Zakaria ('the deceased') at the age of 27, the eldest son of the plaintiffs. Liability was apportioned at 80% jointly against the first and second defendants whereas no liability was imputed against the third defendant, Muhammad Azmer bin Jamei, the other party who was involved in the accident that fateful night at KM177.8 the North-South Highway (southbound). For ease of reference, I will refer to the first and second defendants as PLUS and PROPEL, respectively, in this grounds of judgment. It is noted that in the appeals to the High Court, Muhammad Azmer bin Jamel was not named as a respondent.

[2] There were actually two suits filed separately against PLUS and PROPEL, Suit No AB-A53KJ-93–08 of 2021 was filed at the Magistrate's Court in Taiping by Muhammad Azmer bin Jamel who made a claim against the estate of the deceased and PLUS and PROPEL for the damages and injuries suffered. Meanwhile, in Suit No AB-A53KJ-145–11 of 2020, the parents of the deceased brought the claim against PLUS and PROPEL as well as Muhammad Azmer bin Jamel at the Sessions Court in Taiping. An application was made on 2 December 2021 to conduct the hearings of these two suits together before the SCJ and the application was allowed.

[3] On 10 April 2023, this court heard the appeals and reserved judgment. Then on 11 May 2023, the court delivered judgment wherein the appeal by PLUS and PROPEL was dismissed with costs and the appeal by the plaintiffs was allowed with no order as to costs. The plaintiffs had appealed only on the issue of the monthly contribution by the SCJ which was stated as RM300 in the draft judgment and grounds of judgment of the sessions court whereas the SCJ pronounced the amount as RM500 in open court on 24 May 2022.

FACTS OF THE CASE

[4] According to the pleadings, PLUS, is the concession holder of the PLUS Highway in accordance with s 11 of the Highway Authority of Malaysia (Incorporation) Act 1980 (Act 231). PROPEL maintains and manages the PLUS Highway to ensure the safety of the expressway users. This was the major point of contention in the suits.

[5] On 27 April 2018 approximately at 11.45pm, the deceased was riding his motorcycle bearing registration number PAS 8637 and his friend, Muhammad Azmer bin Jamel (SD2), was on motorcycle with the registration number KQ 8472 on the PLUS highway. Both of them were part of a convoy of seven motorcyclists heading from Kuala Ketii, Kedah towards Banting, Selangor. It is a well-known fact that parts of the highway are not well-lit or not

lit at all due to the extensive length of the infrastruture which stretches in the west coast of the Peninsular from the northern state of Perils all the way down to the southern-most state of Johor.

[6] Upon reaching KM177.8, according to the eyewitness to the incident SD2 who was riding behind the deceased's motorcycle, it struck a yellow-orange metal object lying on the emergency lane. The deceased was flung onto the right (fast) lane. In the agony of the moment, SD2 could not avoid the fallen motorcycle and hit it where the impact of the collision caused both machines to skid and were dragged to the emergency lane where both eventually stopped. SD2 was flung onto the left (slow) lane. SD2 did not pass out when he fell and managed to use the light on his handphone to see where the deceased had fallen as the area was very dark, gelap gelita' he said. The deceased was still breathing at that time. With the help of the others in the convoy, they moved him onto the emergency lane but the deceased passed away not long after that. Then an ambulance came and took SD2 to the nearest hospital as he sustained a fractured left arm. He lodged a police report on 30 April 2018 (P4).

[7] The deceased's father (SP3) was informed about the accident that night and lodged a police report almost a week later on 2 May 2018 (P5) as he had to attend to the deceased's funeral and other related matters. According to him, he and his wife filed the claim as they were dependants of the deceased whereby he contributed to his parents' monthly upkeep in the amount of RM700. The deceased was working as an operator at Inokom Sdn Bhd since 7 June 2011 and was earning a monthly salary of about RM1,500 including allowances. This was confirmed by a representative of his employer (SP2) in their letter and payslips were exhibited as P9, P10(a) and (b).

[8] SP1 was the Investigation Officer who arrived at the scene of the accident approximately at 12.40am. He testified that he saw the yellow-orange metal object on the emergency lane (refer to P4(C and D)) and both motorcycles had been moved there too. According to SP1, the cause of death was determined to be 'Polytrauma Secondary to Road Traffic Accident' (refer to post mortem report P12). The metal object was sent to the Chemistry Department of Malaysia and it was confirmed that the rim of the front tyre of the deceased's motocycle was dented, A sample of yellow paint found on the motorcycle was taken and found to match the paint of the yellow metal object. The chemist report (P8) confirmed that the tyre of deceased's motorcycle most likely hit the yellow metal object in the position as per photograph P8(viii).

[9] On 11 January 2022, SD2 had settled his claims with PLUS without admission of liability and recorded a consent judgment. His claim against PLUS and PROPEL was subsequently withdrawn.

A EVALUATION AND FINDINGS OF THE COURT

[10] It was contended by the plaintiffs that the deceased died due to the accident wherein he did not realise the imminent danger on the road surface as there was no lighting or warning sign nor any safety cones placed at the site. Therefore, he could not have taken any action to avoid the metal object and was not contributorily negligent in that regard. The particulars of PLUS and PROPEUs breach of statutory duty of care and common law duty of care were contained in paragraph 7 of the Statement of Claim. The deceased was a lawful user of the highway. It was alleged that PLUS and PROPEL had not provided a road surface that was free from any hazards or nuisance as a result of the existence of foreign debris or that they had omitted to remove the foreign metal object on the stretch of road where the accident occurred, resulting in the deceased being killed almost immediately.

[11] It was submitted during the hearing by the defendants' counsel that 'we are not disputing the decision of SCJ in that regard but the liability of 80% of the appellant' where it should be the reverse ie at only 20%. SD2's evidence should be tested against the silent evidence. The defendants argued that the deceased and SD2 were riding on the emergency lane as there were only an emergency lane and another lane there and all the scratch marks were only on the emergency lane. Although the highway was dark and with the headlights of the first motorcycle, and had he been riding at a safe speed within the limits of his light the deceased could have seen the metal object on the road, There was no evidence how long the object had been on the highway. The patrol personnel could not be held liable as they had passed by that area 20 minutes prior to the accident and told the court that the road was clear.

[12] The witnesses gave evidence that the metal object could have come/fell from a lorry or container and PLUS could not be expected to be following each vehicle and see if it dropped something. It was not a strict liability issue and s 5 of the Federal Roads (Private Management) Act 1984 (Act 376) states:

> 5 Duty to maintain road, bridge or ferry
>
> Any person who is authorised to demand, collect and retain tolls under an order made under section 2 shall maintain in good repair and condition and in accordance with sound engineering practices the road, bridge or ferry, in respect of which the order is made.

[13] Therefore, it was submitted that the deceased had contributed substantially to the accident and the SCJ had imposed a higher duty upon the defendants, The standard of care is only what is reasonably foreseeable as distinction must be made between a permanent danger due to want of repair, and a transient danger due to elements which the latter is temporary in nature.

Moreover, the courts do not have the means to assess what highway authority should do since it involves costs. The case of *Burnside and another v Emerson and another* [1968] 1 WLR 1490 was cited where the considerations are as follows:

(a) the plaintiff must show that the road was in such a condition as to be dangerous for traffic. In seeing whether it is dangerous, foreseeability is essential;

(b) the plaintiff must prove that the clanger was due to the failure to maintain which includes failure to repair the highway. In this regard distinction is to be drawn between a permanent danger due to want of repair, and a transient danger due to elements. When there are potholes or ruts in a classified road which have continued for a long time unrepaired it may be inferred that there has been a failure to maintain. When there is transient danger due to elements, be it snow, ice or heavy rain the existence of the danger for a short time is no evidence of failure to maintain; and

(c) if there is failure to maintain, whether the highway authority showed that it took all reasonable care to maintain the highway.

[14] In regard to the issue of quantum, the defendants submitted that the claim for RM500 per month for dependency was wrong because she should have deducted some amount for the expenses of the deceased's siblings as they were not dependants; only parents were dependants in this case and they submitted that RM300 would be an appropriate amount. Moreover, the deceased's father earned RM1,800, hence they did not need the extra money from him for the siblings.

[15] The plaintiffs in reply submitted that SP1 was an independent witness and it could not be said that his evidence was hearsay. It was patently clear from SD2's evidence that the metal object was on the slow lane and his evidence was not successfully challenged. There was no evidence that the deceased and SD2 were travelling fast or exceeded the speed limit of 110km/h on the highway, SD2 also told the court that it was very dark out there and he could barely make out the yellow-orange metal object in the dark of the night.

[16] The court was urged that it was the duty of PLUS and PROPEL to maintain the highway free from debris to ensure safety of the users. The last round was made about 20 minutes before the accident. This was argued to be insufficient because SD1 stated that while he was patrolling the area, there was no debris on the road. SD1 admitted the monitoring was only through the naked eye to see whether there was any obstruction on the highway at the material time and he did not go down to check with a torchlight Their vehicle headlight showed visibility of up to 50 meters. SD1 agreed in

cross-examination that monitoring should have been more frequent to ensure the highway was safe.

[17] On the quantum issue, it was the plaintiffs' contention that the dependency amount should be RM500 as the deceased earned RM1,500 including overtime and allowances less 1/3 for living expenses of the deceased. There was no direct evidence that the money went to the siblings because it was only the oral evidence given by SP3 and presumption cannot simply be made without concrete evidence.

Liability

[18] In the case of *Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 5 MLJ 360, the Court of Appeal stated:

> [67] Negligence is a tort and three things must be proved to support the claimant's claim:
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> (a) that the defendant owes the claimant plaintiff a duty of care;
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> (b) that the defendant is in breach of that duty of care; and
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> (c) that the claimant plaintiff suffers damage as a result of that breach of duty and that damage is not too remote,
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> [68] According to Alderson B in *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781, p 784:
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> > Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.
>
> [69] The standard of conduct to determine negligence is that of the reasonable man. It is an objective test.

[19] It is trite law that an appellate court would be slow to disturb the findings of the trial court unless it is convinced that there have been substantial misdirection of facts and law which merited appellate intervention. The appellate court will determine whether or not the trial court arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. It will examine the process of evaluation of the evidence by the trial court. A decision arrived at by a trial court without or insufficient judicial appreciation of the evidence may be set aside on appeal. This is consistent with the established 'plainly wrong' test: *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC), Hence, regardless of any number of grounds raised in the Memorandum of Appeal, the duty of the appellate court in a civil appeal is to determine whether the appellant has proved his case on a balance of probabilities.

[20] It is also trite that the trier of fact would have had the benefit and advantage of seeing and hearing the witnesses and the opportunity to assess their demeanour: *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214. He or she would have had first-hand opportunity to evaluate and appraise the evidence of the witnesses.

[21] The SCJ had written a long and quite comprehensive grounds of judgment. Having considered the evidence and the SCJ's grounds of judgment against the submissions by the parties, I agreed with the findings of facts made by the sessions court. The evidence was very clear that the deceased died almost immediately after his motorcycle ran into the yellow-orange metal object on the road. Although SD2 was the deceased's friend, I found that he was a competent witness and there was nothing to suggest that he was biased against any of the parties. His evidence was corroborated by SPVs evidence, the forensic analysis (P8P and also by the evidence of SD1, Therefore, I did not see it fit to interfere with the factual findings of the trial judge because she had given a reasoned judgment and applied the relevant laws in arriving at her decision: *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177; [2018] 2 CLJ 641.

[22] There were a few case laws referred by the parties pertaining to PLUS in the past which I will elaborate here as I was of the view that they could be distinguished from the facts; where the defendants submitted were applicable to the present appeals. I am mindful of the general principles in *Burnside v Emerson* as well as the law that a statutory duty of care did not mean that there existed an automatic duty in common law by the relevant authority towards the body or class of persons the statute was intended for: *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057. An exception to this would be where the authority has done a positive act to the highway to create a danger, for example if it installed something on the highway which inadvertently caused the accident. In such a case, a common law duty does arise, in accordance with ordinary principles of tort law. Without the positive act by the authority, a plaintiff cannot plead the common law duty of care for an omission by the authority.

[23] I also accept that a distinction has to be drawn between a permanent danger due to want of repair, and a transient danger due to elements as have been established in case laws: *Burnside v Emerson*. Diplock LJ in that case held that 'Repair and maintenance thus includes providing an adequate system of drainage for the road and it was in this respect that the judge found the highway authority had failed in their duty to maintain the highway. The court was urged that the courts do not have the means to assess what highway authority should do since it involved costs. A balancing exercise is required between the risk of injury on the one hand and on the other hand, the costs/resources required to

eliminate the risk ie the test of 'reasonable practicability': *Edwards v National Coal Board* [1949] 1 KB 704 and *Baker v Quantum Clothing Group* [2011] 1 WLR 1003. This was exactly the argument of the defendants, namely, it was not practical for PLUS and PROPEL personnel to go on a foot-patrol to ensure the road is free from fallen debris etc.

[24] So we have to consider next whether the authority here has assumed responsibility to protect its infrastructure-users (whose numbers come up to the millions, the court is entitled to take judicial notice of this fact), from harm when using the highway, or whether it has 'created' any dangers from the management and maintenance of the highway: *Gorringe*'s case. A highway authority may not be liable in a tort action to its users so long as the authority did not create the tort itself.

[25] Coming to the Malaysian cases, I have referred to a number of cases that involved PLUS which were cited to by the parties as well as from my own research. Comparison has been made in the form of a table below for ease of reference:

No.	Case name and citation	Decision/remarks
1.	Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara-Selatan [1997] 5 MLJ 488; [1997] 4 CLJ 54	– High Court, Melaka – strayed cow on highway collided with the deceased's car – breach in the fencing system – defendant found to be liable for negligence, breach of statutory duty, breach of contract – area had experienced broken fences but the defendant did not see it fit to take extra measures – forseeable that collision would occur – claim for general damages, special damages and loss of deendency allowed
2.	Projek Lebuhraya Utara-Selatan Bhd v Hmd Rais Hussin A Mohamed Ariff [2011] 10 CLJ 679	– High Court, Kuala Lumpur – appeal from sessions court – accident caused by carcass of a wild boar on the highway

		– SCJ approtioned liability at 10% to the plaintiff and 90% to defendant – PLUS appealed – HC found area where the accident happened was not prone to wild animals – possibility the animal dug its way under the fence – HC found defendant not liable
3.	Muhamad Nizam Rejab v Projek Lebuhraya Usahasama Berhad [2017] MLRSU 35	– Sessions Court, Sg, Petani – two motorcycles crashed after hitting a fallen branch of a tree – the court found the plaintiffs were unable to prove their claim – contradictions in testimonies of the plaintiff witnesses – court held it was impossible for the staff of the defendant to attend and immediately remove the fallen branch – plaintiffs appealed
4.	Projek Lebuhraya Usahasama Bhd v Hawa Liyana binti Hashim (suing as the lawful wife and dependant of Imran Kamali bin Ahmad Nadzirin, deceased) [2018] MLJU 2011	– High Court, Ipoh – appeal from sessions court – PLUS found to be 100% liable – motorcyclist collided into a piece of wood – on appeal, the JC reversed the finding as there were contradicitions found in the evidence by the plaintiff – she failed to establish negligence
5.	LBS Travel Sdn Bhd dan satu lagi lwn Nathan a/l Muthayah dan lain-lain [2019] 8 MLJ 767	– High Court, Ipoh – appeal from sessions court – PLUS was the third respondent – SCJ found the R1 and R2 to be 100% liable and exonerated PLUS

		– fatal accident and the cause of it was two tyres that had come off from R1's trailer – JC found PLUS to be equally liable and apportioned blame to 50–50 – PLUS cannot avoid liability as need compliance with response time to prevent event from happening and not to use the fact that they were there almost immediately as the yardstick – PLUS appealed to the Court of Appeal (COA) – COA reversed the HC order on 3 October 2019
6.	Ahmad Rashidi bin Yahya & Anor v Projek Lebuhraya Usahasama Bhd [2021] MLJU 1632	– High Court, Taiping – appeal from magistrate's court – cause of accident was an iron block on the highway which the first plaintiff could not avoid in time – misappreciation of facts – iron block removed from the scene by workers but SP3 managed to capture photographs of it with his handphone, showing the date and time and the evidence was admitted in – JC found first plaintiff to be 60% liable and PLUS 40% – PLUS appealed to the COA – COA affirmed the order of the JC on 29 September 2022
7.	Projek Lebuhraya Usahasama Bhd v Abdul Azim John bin Abdullah [2022] MLJU 1181	– High Court, Johor Bahru – appeal from sessions court

		– accident caused by motorcyclist crashing into a wooden block on the highway at night, very dark and no lighting – SCJ found PLUS to be 100% liable – PLUS appealed – HCJ partly allowed the appeal by reducing the amount of damages – HCJ re-apportioned liability at 30% on the plaintiff and 70% to PLUS
8.	Muhammad Farhan bin Daud lwn Projek Lebuhraya Usahasama Bhd (Plus) [2023] MLJU 380	– Magistrate's Court Rembau – motorcyclist travelling at 2.30am, condition very dark and no lighting – crashed into plastic pellets on the highway – court found the plaintiff had proved his claim (damages and injuries) – no inconsistencies in the plaintiff's case – no contributory negligence – defendant 100% liable – not known if PLUS appealed

[26] The above cases make up just a small fraction of the negligence suits against PLUS since its inception more than 30 years ago. Looking at these cases, since from the time of *Parimala*'s case it appeared that not much has changed with PLUS and/or PROPEL in terms of its outlook in respect of the duty of care that it owed to highway users. The judgment of the learned JC of the Ipoh High Court (as His Lordship then was), which I agree with whole-heartedly, in the case of *LBS Travel* stated the points succintly:

> [27] Namun demikian, mahkamah hi berpendirian fakta mengenai ketibaan pihak responden ketiga di lokasi kemalangan 20 minit selepas SP4 membuat laporan atau enam minit selepas SD3 dan SD4 menerima maklumat mengenai kemalangan bukanlah isu yang material. Ini kerana 20 minit atau enam minit, hatta satu saat sekalipun tidak dapat mengubah apa-apa. Ini kerana pihak responden ketiga tiba di lokasi kemalangan *selepas* kemalangan. Ketibaan pihak responden ketiga jikapun diiringi dengan pakar penyelamat yang terbaik serta peralatan tercanggih tidak mengubah apa-apa, dan tidak dapat mengembalikan nyawa iapan mangsa yang telah terkorban, kerana pihak responden ketiga tiba *selepas* kemalangan berlaku. Inilah yang ingin dibangkitkan oleh mahkamah ini dalam penghakiman ini.

SISTEM PENCEGAHAN KEMALANGAN LEBUHRAYA

[28] Pengguna dan pengendali lebuhraya telah ditetapkan dengan tanggungjawab masing-masing. Tatkala berada di lebuhraya, para pengguna hendaklah memastikan keadaan kenderaan dan pemandu serta tatacara pemanduan mematuhi segala kehendak yang ditetapkan oleh undang-undang.

[29] Di pihak responden ketiga pula, selaku pemegang konsesi Lebuhraya Utara-Selatan, adalah ditetapkan tanggungjawab yang wajib dipatuhh Tanggungjawab ini terlalu banyak untuk disenaraikan, namun dalam konteks kes di hadapan mahkamah ini, tugas dan tanggungjawab responden ketiga termasuklah mewujudkan keadaan lebuhraya yang membolehkan pemanduan selamat yang meliputi keadaan permukaan lebuhraya yg selamat dan bebas dari segala bentuk bahaya (*hazard*) akibat kewujudan bendasing (*debris*).

[30] Mahkamah ini tidak menafikan antara tugas dan tanggungjawab responden ketiga sebagai pemegang konsesi pengurusan Lebuhraya Utara-Selatan adalah bagi memastikan wujudnya mekansime bantuan dan pertolongan kepada mangsa kemalangan atau mereka yang berhadapan dengan apa-apa masalah tatkala berada di lebuhraya. Mahkamah ini membuat *judicial notice* bahawa mekansime bantuan di lebuhraya yang sedia ada yang diwujudkan oleh responden ketiga amat baik. Adalah diakui bahawa tindakan pihak responden ketiga selama ini seperti penyelenggaraan turapan lebuhraya, kewujudan rondaan 24-jam bagi memberi bantuan kepada pengguna lebuhraya, penyelenggaraan perkakasan lebuhraya (*highway furnitures*), dan juga penyediaan kawasan rehat dan rawat, merupakan sebahagian dari penyediaan persekitaran lebuhraya yang selamat dan terjamin (*safe and secured highway)* yang telah dilaksanakan dengan sempurna.

[31] Mahkamah ini juga dapati responden ketiga ada mewujudkan Pusat Pengurusan Trafik Lebuhraya (*Traffic Management Centre*) (TMC) berpusat di Subang yang mula beroperasi sejak tahun 2008. Fungsi utama TMC ini adalah untuk mengutip dan menyebarkan maklumat trafik secara *real-time* bagi pengurusan trafik lebuhraya yang efisyen serta mewujudkan mekanisme bantuan yang terselaras bagi pengguna lebuhraya. TMC dilengkapkan dengan peralatan terkini dan tercanggih dari Amerika Syarikat, Belgium, Perancis, Switzerland dan Jerman. TMC juga bertanggungjawb menguruskan peralatan *intelligent transport system* milik responden ketiga yang meliputi *variable message sign (VMS), automatic vehicle detection system (AVDS), close circuit television (CCTV)* dan *global positioning system (GPS)*. Satu lagi bidang tugas utama TMC ialah penyebaran maklumat trafik lebuhraya kepada pengguna lebuhraya melalui stesen radio, VMS dan juga perkhidrnatan PLUS Trafik Twitter.

[32] Namun demikian, apa yang ingin ditekankan oleh mahkamah ini ialah tanggungjawab pihak responden ketiga untuk mewujudkan satu sistem pencegahan kemalangan di Lebuhraya Utara-Selatan. Jika sistem atau mekanisme pencegahan kemalangan ini telahpun sedia wujud, maka mahkamah ini berpendirian sudah sampailah masanya bagi pihak responden ketiga merombak semula sistem atau mekansime itu kerana keberkesannya didapati amat minima. Adalah menjadi tanggungjawab pihak responden ketiga sebagai pemegang konsesi sejak 32 tahun lalu untuk memenuhi syarat-syarat konsesi yang dianugerahkan oleh Kerajaan Malaysia kepadanya untuk mewujudkan persekitaran lebuhraya yang selamat dalam ertikata sepenuhnya.

...

[33] Mahkamah ini membuat *judicial notice* bahawa berdasarkan statistik dan berita kemalangan, terutama yang melibatkan kemalangan maut, yang saban hari dilaporkan berlaku di sepanjang jajaran Lebuhraya Utara-Selatan di bawah kendalian pihak responden ketiga, yang merupakan jaringan utama, perhubungan darat di Malaysia, seolah-olah memberi gambaran bahawa pencegahan kemalangan lebuhraya masih belum menjadi fokus utama pihak responden ketiga.

[39] Disebabkan falsafah yang lebih tinggi yang dinyatakan oleh mahkamah ini gagal dilihat dengan jelas oleh responden ketiga, maka mahkamah ini memutuskan sudah sampai masanya bagi responden ketiga dipersalahkan dan diletakkan liabiliti apabila berlaku kemalangan seperti dalam kes di hadapan mahkamah ini, terutamanya disebabkan kegagalan pihak responden ketiga membuktikan kepada mahkamah ini bahawa ia telah mewujudkan suatu sistem dan mekanisme pencegahan kemalangan dengan menggunakan segala kepakaran dan peralatan canggih sedia ada, dan telah melaksanakan tanggungjawabnya seperti ditetapkan di bawah mekansime itu. Andainya sistem dan mekanisme telah wujud semasa kejadian ini, pihak responden ketiga akan sampai di lokasi KM 326.3 di mana SP4 nampak tayar lori berada di tengah lebuhraya untuk mengaiih tayar itu antara jam 12.50-1 pagi, yakni *sebelum* kemalangan berlaku.

[40] *Responden ketiga tidak boleh mengatakan adalah mustahil untuk ia mengetahui terdapatnya tayar yang terjatuh dari lori yang dipandu responden pertama pada pagi kejadian, tanpa menunjukkan sebarang bukti kepada mahkamah bahawa ia telah melakukan segala usaha dan inisiatif untuk mewujudkan sistem dan mekanisme pencegahan kemalangan, Mahkamah ini memutuskan bahawa responden ketiga bertanggungjawab sepenuhnya, sejajar dengan tanggungjawab yang dipikulkan kepadanya sejak lebih 32 tahun lalu oleh Kerajaan Malaysia selaku pemegang konsesi Lebuhraya Utara-Selatan, dengan menggunakan segala kepakaran, sumber dan teknologi sedia ada, serta berbekalkan sumber kewangan yang dimilikinya, untuk tnenggubal satu dasar bertujuan mewujudkan sistem dan mekansime pencegahan kemalangan lebuhraya yang bersesuaian. Mahkamah ini juga memutuskan adalah juga menjadi tugas dan tanggungjawb lembaga pengarah syarikat responden ketiga untuk menjadikan dasar ini sebagai agenda wajib dalam setiap mesyuaratnya. Begitu juga, pengurusan tertinggi responden ketiga wajib menjadikan dasar ini sebagai agenda utama dalam setiap mesyuaratnya. Setelah dasar ini digubal dan dipersetujui dan sistem dan mekanisme pencegahan kemalangan lebuhraya itu diwujudkan kelak, adalah juga menjadi tanggungjawab lembaga pengarah dan pengurusan tinggi syarikat responden ketiga untuk menterjemahkan sistem dan mekanisme itu sebagai budaya kerja seluruh warga syarikat responden ketiga.*

[41] *Hanya setelah keadaan yang disebutkan di perenggan di atas dibuktikan oleh responden ketiga telah dilaksanakan, barulah mahkamah ini boleh berpuashati bahawa responden ketiga tidak boleh dipersalahkan jika berlaku lagi kemalangan seperti dalam kes ini*. (Emphasis added.)

[27] Although it has been reversed by the Court of Appeal, as far as I am aware, there is no written grounds. In the other case ie *Ahmad Rashidi*, the Court of Appeal affirmed the findings of the learned JC (as His Lordship then was). The learned JC then had stated:

A [35] In the present case, it is obvious that the first plaintiff did not collide into another vehicle which had caused the alleged accident, nor another motor vehicle had collided into his motor car resulting in the accident. It is also obvious that there is no evidence of irreparable damage to the railings on the highway evidencing that the plaintiff whilst driving his motor car had collided into it, thus causing damage B to his car as well causing injuries to his wife. What is glaring and obvious in the present case is the existence of an iron block, a fairly huge one, on the highway which was unavoidable for a motorist like the first plaintiff who cannot but hit on to it as he was driving at a considerable speed on the highway, thus causing damage to his car and injuring himself and his wife. It is very unlikely that the iron block had C been thrown from somewhere else, or from another motor vehicle causing obstruction on his lawful right of way. What is obvious is that the iron block, a big one found on the road, was already there when the first plaintiff was driving his car. He could not avoid it, thus colliding into it causing extensive damage to his car and also its sharp edges had pierced on to the undercarriage of his car causing extensive injuries to his wife, the second plaintiff who was together with him at the time of D collision. *It is evident that the iron block had been on the highway at the material time when the first plaintiff was on his lawful right of way heading to Sungai Petani with his wife. His expectation was a safe and unhindered travel on the highway. Any form of obstruction would not be expected by htm when he was driving. But of course, he has to observe a proper and adequate look out when he was driving, just in case other motorist* E *on the highway is not careful, albeit them owing a duty of care when plying on the highway. But to find an iron block is definitely unforeseeable. To be confronted with it in a split moment had in fact led to the inevitable accident.* (Emphasis added.)

F **[28]** Similarly, in the present appeals, I had found that the accident happened because the deceased's motorcycle had run into the yellow-orange metal object on the highway and the area was very dark. This was also my observation in some of those cases above where the accidents occurred at night and there were no street-lamps on the highway. The defendants submitted that G they had taken all reasoanable measures to ensure the safety of the highway when the patrol team had only passed by the a scene 20 minutes prior to the accident. The SCJ found there was a time frame of more than 30 minutes between 11.15–11.45pm as admitted by SD1. They had been patrolling in a big vehicle whereas the deceased and SD2 were travelling on motorcycles, H which is not an apple-to-apple comparison in terms of their ability to visualise the area/the stretch of highway at the material time, The relevant notes are as follows:

I Hak: Tapi saya ada satu soalan daripada Mahkamah tentang borang yang di isi itu menyatakan bahawa, satu ayat penyata mengatakan bahawa kemalangan itu dikatakan berlaku terlanggarsatu objekdi atas jalan. *Kalau kamu kata kepada soalan encik Sela kamu kata kamu tak tahu di lorong mana objek itu berada pada masa kemalangan dan sama ada memang objek itu dah ada di situ, kenapa kamu tulis begitu dalam borang itu?*

SD1: Dengan izin puan. Semasa saya melalui kawasan itu, Bandar Baru, Jawi ... Bandar Baru ke Alor Pongsu, laluan kami kat situ tak ada sebarang objek di atas jalan raya.

Hak: *Itu jam berapa? SD1 Saya rujuk pada log sheet puan. Err ... masa terakhir saya pusing Bandar Baru jam 2315, sampai ke Alor Pongsu jam lebih kurang 2340, Di antara jam 2315 dan 2340 ini kami lalu tempat kemalangan.*

Hak: 23?

SD1: 2315

Hak: *2315 kamu lalu kamu lihat tak ada apa-apa di atas jalan raya.*

SD1: *Tak ada apa.*

Hak: *Jadi kenapa kamu tulis kemalangan tu disebabkan terlanggar objek atas lebuhraya?*

SD1: *Setibanya saya di lokasi puan, maklumat daripada budak-budak motor ramai ... (Hakim mencelah)*

Hak: *Okay, kamu sampai ke lokasi tu jam berapa?*

SD1: *0002. 1202 minit tengah malam.*

Hak: *Berapa minit tu jaraknya antara masa kamu melihat tiada objek hingga kamu sampai semula ke lokasi itu?*

SD1: *Lebih kurang 45 minit hingga 50 minit.*

Hak: So, dalam jangka masa lebih kurang 45 minit hingga 50 minit, kamu sampai semula di situ dan kamu lihat ramai orang di situ.

SD1: Ya.

[29] The SCJ was referring to an exhibit ie Borang Catatan PLUS Ronda at p 133 of the Rekod Rayuan Mahkamah Sesyen. From the evidence above, it appeared that SD1 relied on information from others about the accident. How could he not have seen the metal object when he arrived at the scene after the accident happened? He was evasive in his answer and in cross-examination he later agreed that PLUS could have managed the maintenance of the highways better, such as by having more frequent and thorough checks during the patrols.

[30] It is trite law that the burden of proof in an action for negligence lies with the plaintiff: *Ng Chul Sia v Maimon bt Ali* [1983] 1 MLJ 110. The duty of the court is to determine which version is more inherently probable based on available evidence: *Noorianti bte Zainol Abidin & Ors v Tang Lei Nge* [1990] 2 MLJ 242. This court found that the version of SD2, as supported by the findings of SP1, was more inherently probable on a balance of probabilities. The deceased was also contributorily negligent as was the finding of the SCJ, and which I would not disturb (refer to para 63 onwards of the SCJ's grounds of judgment). SD2 could barely make out the object on the highway at that time and he tried to avoid running into the first motorcycle but to no avail.

There was no brake marks from the first motorcycle, which lend credence to SD2's version that the deceased could not brake his machine in time. This is most likely due to the fact that the area was very dark as there was no lighting.

[31] I also agreed with the findings of the SCJ that SD2 was not to blame for the accident as he had done his best to avoid crashing into the deceased after the latter was thrown off the motorcycle. On this point, I refer to the case of *Khairun Nizad bin Daud & Anor v Juprin Paul* [2018] 9 MLJ 32, where the learned JC as he then was stated:

> [32] I am in agreement that there is always a duty on road users to remain vigilant at all times as public roads are always a venue for danger, whichever time of the day or location, where one can never be entitled to take it easy and be off-guard because it is a quiet stretch of road or a time of the day where traffic volume is low.

[32] Coming back to the earlier issue of whether liability can be imputed on PLUS and PROPEL, as can be seen from the cases cited above, the courts have been divided on this issue. Apart from the general principles, the particular facts of each case would also determine which way the court decided on the matter Has PLUS assumed responsibility to protect its highway users? Out of curiosity I had done a bit of research and gone into the PLUS website. This is no secret, it is in the open source. Particularly in its Corporate Values page, they have proudly listed six values therein, two of which are 'Taking care of you' and 'Do things better'. It appears that PLUS acknowledged and has built-in its statutory duty into its Corporate Values. They should not just be paying lip-service but must be seen to be proactive in undertaking reforms of its maintenance of the highways to ensure that they really are taking care of the users and strive to do things better rather than re-iterating the same argument each time that it would be unreasonable to expect PLUS and PROPEL to always keep a look out for fallen debris and foreign objects on the highways!

[33] Counsel for the defendants cited the case of *Ali v Bradford Metropolitan District Council* [2012] 1 WLR 161 where the UK Court of Appeal stated:

> Section 130 was concerned with the protection of the legal rights of the public at large and about access, not about safety. It placed no express obligation on the Authority to remove obstructions and there was no justification for imposing such an obligation. Section 150, which did make express provision about the duty of an Authority to remove obstructions, was a public law duty with its own statutory method of enforcement. The same was true of Section 130.
>
> After the decision in Goodes v East Sussex CC, Parliament had extended the law to create greater rights, but only the limited extent set out in Section 41(1a) and in respect of ice and snow.
>
> The claim in nuisance was based under the principle established in *Sedleigh-Denfield v O'Callaghan*:

An occupier of land 'continues' in nuisance if, with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end, though with ample time to do so.

In so doing, the Claimant also relied on a passage of Lord Scott in *Gorringe v Calderdale* in which he had noted that other than for claims arising out of a failure to maintain under Section 41 liability continued to be determined by the common law principles of negligence or public nuisance.

To apply the ruling in *Sedleigh-Denfield* to these circumstances would involve extending its ratio to a very different type of situation from that which the court was considering. To compare a relationship between neighbouring private land owners with the relationship between a Highway Authority and users of the highway was not to compare like with like. Significantly, a Highway Authority was not an occupier of the highway and did not owe to highway users a common duty of care as Lord Hoffmann had noted in *Gorringe*.

The Highways Act provided a complex statutory code governing the obligations of Highway Authorities. To require Highway Authorities 'to carry out regular precautionary inspections of public footpaths of all descriptions to see that they were kept free from obstructions would have substantial economic implications for Local Authorities. The Courts did not have the tools for carrying out a costs benefit analysis for deciding the merits of imposing such an obligation.

[34] Section 150 of the Highway Acts 1980 provides:

Duty to remove snow soil etc, from highway.

(1) If an obstruction arises in a highway from accumulation of snow or from the falling down of banks on the side of the highway, or from any other cause, the highway authority shall remove the obstruction;

(2) ...

[35] This court was urged by the defendants in its submission that the courts did not have the tools for carrying out a costs benefit analysis for deciding the merits of imposing such an obligation:

Penghakiman dalam kes di atas menunjukkan bahawa meletakkan bebart yang tinggi seperti mejalankan rondaan yang lebih kerap, dan banyak cadangan lain yang boleh dibuat perlu juga dibanding dengan 'substantial economic implications' dalam kes ini seperti keperluan menambah kadar toll untuk membelanjakan lebih dalam pengawasan.

Seperti dinyatakan daiam kes terse but 'The Courts did not have the tools for carrying out a costs benefit analysis for deciding the merits of imposing such an obligation'.

Oleh itu, sebelum meletakkan beban yang terlalu tinggi atas Defendan-defendan, Mahkamah yang mulia ini perlu mengambil kira bahawa 'The Courts did not have the tools for carrying out a costs benefit analysis for deciding the merits of imposing such an obligation'.

[36] It is noted that the UK Highways Act is even better as it spelt out the duties and co-operation between highway authorities and local councils. PLUS would do well to amend its law to provide for the same. PLUS having been in the industry for so long surely has the expertise and such cost benefit analysis tools needed to do so. It cannot forever hide behind such excuses as were submitted in this appeal and many other cases before this.

[37] In so far as the Malaysian law is concerned, I refer to the case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645, the Federal Court held:

> [1a] The Court of Appeal is, as a general rule, bound by its own decisions. The three exceptions enunciated in *Young v Bristol Aeroplane Co Ltd* are:
>
> (i) a decision of the Court of Appeal given per incuriam need not be followed;
>
> (ii) when faced with a conflict in respect of its own previous decisions, the Court of Appeal may choose which decision to follow irrespective of the dates of those decisions; and
>
> (iii) the Court of Appeal ought not to follow its own previous decisions if such decisions are, expressly or by necessary implication, overruled by the Federal Court, or if they cannot stand with a decision of the Federal Court In respect of exception (i) above, the words 'per incuriam' are to be interpreted narrowly to mean a '... decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned ...'
>
> [1b] *Courts in the tiers below the Court of Appeal cannot rely on the 'per incuriam exception' applied by the Court of Appeal for itself, but may choose between two conflicting decisions irrespective of the dates of those conflicting decisions.* (Emphasis added.)

[38] Having considered all the issues, records and submissions, I was of the view that liability can be imputed on PLUS and PROPEL jointly and therefore decided that the appeal on liability should not be allowed.

On the issue of quantum

[39] In the case of *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675 the court there referred to *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22; [1985] 1 CLJ 429 where the Federal Court held:

> The principle that could guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case, in particular the amount of the award. *In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that either there was an omission on the part of the judge to consider some relevant*

materials or he had admitted for purposes of assessment some irrelevant considerations. If the court is satisfied or convinced that the judge has acted upon wrong principles of law then it is justified in reversing; indeed it is its duty to reverse the finding of the trial judge. (Emphasis added.)

[40] The Court also referred to the English case of *Donnelly v Joyce* [1973] 3 All ER 475 where it was held:

[19] The principle for assessing damages for victims of negligence is based on the following. *That the loss of the victim is his needs resulting from the negligence. And that the amount of that loss is ascertained by reference to the proper and reasonable cost of supplying that need. The aim of damages in negligence is to compensate the victim for his loss. That loss is the existence of a need that would not have existed but for the tort.* The computation of that loss in monetary terms for an award of damages is done by reference to the proper and reasonable cost of supplying that need ... (Emphasis added.)

[41] Compensation must be fair, reasonable and adequate but not excessive: *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292; *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016] 2 CLJ 885; and *Wong Li Fatt William (an infant) v Haidawati bte Bolhen & Anor* [1994] 2 MLJ 497. The court has taken into consideration of both parties' submissions and perused the grounds of judgment of the SCJ and concluded that the total amount awarded to compensate the plaintiffs for the loss of their son's life (monthly dependency claim) was fair, reasonable and adequate in the circumstances. But the amount of RM300 that was amended to RM500 was necessary in view of the discrepancy in the pronouncement and the judgment of the sessions court.

CONCLUSION

[42] Premised upon the above considerations, the court found that appellate intervention was not justified in terms of liability and accordingly dismissed the appeal with costs. The court allowed the appeal by the plaintiffs with no order as to costs and varied the quantum awarded for the amount of monthly contribution to RM500 as was pronounced by the SCJ in open court.

Order accordingly.

Appellant's appeal dismissed, respondents' appeal allowed and dependency contribution amount varied to RM500 per month.

Reported by Ashol Kumar